Supreme Court, U. S.
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No. 76-1700

IN THE

Supreme Court of the United States

October Term, 1976

PEOPLE OF THE STATE OF ILLINOIS, *et al.*,
Petitioners

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents

BRIEF OF THE BALTIMORE AND OHIO RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The unpublished per curiam orders of the United States Court of Appeals for the Seventh Circuit are printed as Appendices A, B and C to the Petition herein.

The unreported orders of the Interstate Commerce Commission are printed as Appendices E through H to the Petition herein.

JURISDICTION OF THE COURT

The decisions of the United States Court of Appeals for the Seventh Circuit, and the Interstate Commerce Commission are wholly in accord with sound and well-settled principles of law. The Petition for a Writ of Certiorari presents no valid reason for the exercise of this Court's discretion to review the decisions below.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Seventh Circuit properly held that the Interstate Commerce Commission had not abused its discretion by declining to consolidate three rail line abandonment proceedings.

2. Whether the United States Court of Appeals for the Seventh Circuit properly held that the Interstate Commerce Commission had not improperly considered the Beardstown line abandonment (Finance Docket No. 26745) in a vacuum, without proper regard for interrelationships with two other rail line segments.

STATUTE INVOLVED

The statute involved is the railroad line abandonment provisions of Section 1 of the Interstate Commerce Act, 49 U.S.C. 1, which is printed as Appendix J to the Petition herein.

I

STATEMENT

A brief statement of the facts is given here to show that there are no special or important reasons why certiorari should be granted.

The Interstate Commerce Commission, after receiving evidence at a public hearing held at Springfield, Illinois, on July 10 and 11, 1972, concluded that the public convenience and necessity permitted abandonment of the

43.7 mile railroad line between Beardstown and Coal Shaft (Springfield) Illinois, owned by The Baltimore and Ohio Railroad Company (B&O).

The Commission authorized abandonment of this line because:[1]

(a) Less than one carload of traffic per day originated or terminated on the entire 43.7 mile line.

(b) The track was in poor physical condition, requiring more than $2,800,000 of rehabilitation; and there was no possibility that the cost of rehabilitation could be recouped from the earnings of the line.

(c) Only two shippers appeared at the hearing in opposition to the abandonment, and one of the shippers subsequently dropped its opposition. The Commission said that the paucity of shipper objection to abandonment is a factor to be considered in determining whether public convenience and necessity permit abandonment.

(d) The City of Springfield, Illinois expressed support for the abandonment which will enable the operation of B&O trains through the central downtown district of that city to be discontinued, thereby saving the public authorities an estimated $2,000,000 to $3,000,000 relocation expense.

The Interstate Commerce Commission approved abandonment because of the insignificant amount of traffic handled on the line; the absence of any foreseeable traffic potential in the future; the marginal nature of the operation; the large rehabilitation costs necessary to continue service; and the general lack of interest by shippers in continued operation. [Appendix E]

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[1] See Appendix E. References to Appendices in this Brief are to the Appendices to the Petition for a Writ of Certiorari, unless otherwise stated.

The United States Court of Appeals for the Seventh Circuit, in denying the Petition to set aside the order of the I.C.C. which authorized abandonment said,

> "We begin our consideration by noting that petitioners do not directly attack the substantive conclusion of the I.C.C. that the public convenience and necessity permit abandonment of the northern segment" i.e. the 43.7 mile line between Beardstown and Coal Shaft (Springfield), Illinois. [Appendix A, page 3a]

II

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

A. Summary of Argument

The substance of petitioners' complaint in the Court of Appeals was that the I.C.C. failed to consolidate three B&O abandonment proceedings, and thereby improperly considered the northern segment in a vacuum, without proper regard for interrelationships with two other lines which B&O sought to abandon. That argument is repeated in the Petition for a Writ of Certiorari. The facts, however, clearly establish that the I.C.C. did not abuse its discretion in deciding not to consolidate the proceedings, nor did it consider the northern segment without proper regard for interrelationships with other B&O lines.

B. The Proceedings Before The Interstate Commerce Commission

The Commission did not act arbitrarily or capriciously, nor did it abuse its discretion, in refusing to consolidate the northern segment abandonment with the other proceedings. In fact, it had valid and proper reasons for denying consolidation, as will be discussed, infra.

The Commission assigned B&O's application to abandon the "northern segment" Beardstown branch (Finance Docket No. 26745), and B&O's application to abandon its Shawneetown line (Finance Docket No. 26965) the so-called "southern segment" to the same Administrative Law Judge, Gerald E. Jessup, for hearings and the recommendation of appropriate Orders.

Judge Jessup held a hearing at Carmi, Illinois on June 19-20, 1972, on the Shawneetown abandonment application, and he held a hearing on the Beardstown application on July 10-11, 1972, at Springfield, Illinois. [Appendix E]

Judge Jessup released simultaneous Reports and Orders covering both proceedings on February 14, 1973. The Administrative Law Judge approved the abandonment of the Beardstown line, but he denied the abandonment of the Shawneetown line.[2]

In denying the petition to consolidate both cases, Judge Jessup set forth the reasons for his decision:

> First, he pointed out that each proceeding was clearly identifiable and separate.
>
> Secondly, he found that the shippers and their interests were different.
>
> Thirdly, Judge Jessup said the disposition of the applications is different, i.e., he approved the abandonment of the Beardstown line, but he denied the abandonment of the Shawneetown line. In the case of Beardstown, he found a paucity of shipper opposition to the abandonment, and an absence of any foreseeable traffic potential, whereas in the Shawneetown proceeding, he found that

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[2] The Commission affirmed the Administrative Law Judge on February 17, 1977, in Finance Docket No. 26965 when it dismissed B&O's application to abandon the Shawneetown line. On that same date the Commission authorized the sale of that line to Praire Trunk Railway. [See Appendix I]

the record indicated a very substantial traffic potential, and that the shippers in the area need rail service.

In the Beardstown decision, Judge Jessup emphasized that rail service is available at Beardstown by the Burlington Northern Railroad, and at Ashland by Illinois Central Gulf, and that a number of motor common carriers serve points along the Beardstown line. He mentioned that in addition to motor common carrier service being available, the record showed several shippers on the Beardstown branch operated their own trucks, whereas in his Report and Order denying the abandonment of the Shawneetown line, Judge Jessup said the record fails to establish that there are motor carrier services available in the area to meet the transportation needs of the shippers, and that the Shawneetown line serves a definite transportation need in the area without which some businesses will not have satisfactory transportation service, and others will be adversely affected to the general detriment of the area involved.

Fourthly, the Administrative Law Judge commented that the Beardstown and Shawneetown lines are physically separated by more than 100 miles and are operated separately.[3]

Fifthly, Judge Jessup said that during the entire year of 1971, of the total of 2,505 freight cars handled over the Beardstown and Shawneetown lines, only 14 cars moved over both lines. In other words, there was no common traffic relationship, or affiliation, between the two lines which would necessitate, or require, that the proceedings be heard and disposed of on a consolidated record. It is for this reason that the Administrative Law Judge said,

[3] The Beardstown line and the Flora to Sangamon Junction line (the so called middle segment) are physically separated by more than 5 miles. [Appendix A, p. 2a]

> "Each of the proceedings is clearly identifiable and separate, the shippers and their interests are different, and the proposed disposition of the applications are different, based upon different facts and circumstances applicable to the respective applications." [Appendix E, p. 17a]

Petitioners contend that Judge Jessup committed error in not requiring B&O to provide data with respect to the cars handled on the Beardstown line which also moved on the B&O line between Flora and Sangamon Junction (the middle segment). The Administrative Law Judge, however, set forth an entirely valid and justifiable reason for not encumbering the record in the Beardstown proceeding with inconsequential data. He stated in his Report and Order that the record showed the "predominance" of the Beardstown traffic moves to or from B&O's Indianapolis Division – and therefore does not move over the middle segment at all –and he concluded that such traffic data was not essential for a decision in the Beardstown proceeding. [Appendix E, pages 18a and 19a].

Of course, when his ruling was issued, Judge Jessup was aware that the record showed that the Beardstown line originated or terminated less than one car of traffic per day, and that the "predominance" of the very limited amount of Beardstown traffic, small as it was, moved from the Beardstown line (northern segment) to B&O's Indianapolis Division, and therefore did not move over the middle segment at all.

Petitioners assert in this Court, as they did in the Court below, that the Commission erred in permitting abandonment of the Beardstown line, "without evidence concerning the impact of that abandonment upon the continued viability of the remaining middle and southern segments."

Even the most cursory reading of the Petition for a Writ of Certiorari immediately reveals that it does not

disclose how Petitioners have been prejudiced, damaged, or adversely affected by the Commission's decision to not consolidate the Beardstown proceeding with the other two cases. In the Court below, Petitioners argued that even though the Beardstown line was operated at a loss, it might be desirable to continue that loss operation because the Beardstown line "feeds" traffic to other B&O lines, including the "middle" and "southern" segments. Petitioners speculated that a loss on the Beardstown line "might" be more than offset by profits on one or more other segments, and that discontinuance of service on the Beardstown line might result in greater overall losses to B&O on its other lines.

The basic error in that speculation is that the deficit on the Beardstown branch – under I.C.C. costing and revenue procedures – took into consideration the earnings contribution the Beardstown traffic made to all other B&O lines and segments, including the middle and southern segments; and even with that contribution from the other segments, the operation of the Beardstown line still produced an overall net loss to the B&O railroad system.

The I.C.C. regulations, which apply to all abandonment proceedings, required B&O to show the total revenues generated by the cars transported over the Beardstown line, including the revenues which the Beardstown traffic produced while moving over other B&O system lines and segments, including the Shawneetown branch and the Sangamon Junction to Flora line. The costs of transporting the cars on the Beardstown line, and the cost of handling the Beardstown cars on the other B&O lines and segments were then deducted from the revenue.

The loss incurred in operating the Beardstown line, which Judge Jessup listed in his decision, took into consideration the fact that the operation of the Beardstown branch produced a deficit of $66,638, and the traffic from the Beardstown branch while moving over the other B&O

lines and segments produced earnings of $53,513.[4] Subtracting those earnings from the $66,638 branch deficit results in a B&O System Net Railway Operating Deficit of $13,125.

In other words, the costing and revenue procedures mandated by the I.C.C. regulations are intentionally and deliberately designed to guarantee that the abandonment of a branch line does not take place in a vacuum without regard to its interrelationship to other segments of the carrier. This is accomplished by the Commission's regulations which require the applicant to show the earnings which the line proposed to be abandoned generates to other lines and segments of that carrier.

Set forth as Appendix 1 to this Brief is Exhibit H-14, the testimony of Mr. Rongione, B&O's Manager of Profit Margin Research, which was received into evidence by Judge Jessup at the I.C.C. hearing held at Springfield, Illinois on July 10-11, 1972. Mr. Rongione, in following I.C.C. cost procedures, took the total revenue generated by the Beardstown branch and allocated that revenue to the branch, and to the other B&O lines and segments, by using the I.C.C.'s prorate method, i.e., the mathematical ratio of the car miles moved over the branch to the car miles moved over the other B&O segments. Line 4 at page 5a shows that in 1971 the Beardstown branch produced total revenues to B&O of $165,679. At line 5, revenue of $58,653 was assigned to the branch by the mileage prorate method, and at line 6, revenue of $107,026 was assigned to the other B&O lines and segments. At line 7, miscellaneous revenue charges of $2,080 was credited to the branch.

Pages 10a and 11a of the Appendix contain a summary of total revenues and costs, showing that for 1971

[4] See *Moeller* v. *Interstate Commerce Commission*, 201 F. Supp. 583, 587, for a discussion of the Commission's formula for determining the "feeder value" of a branch line to the other segments of the railroad.

that the Beardstown branch had revenues of $60,733 and incurred costs of $127,371, thereby producing a deficit of $66,638. It also shows that the traffic handled on the Beardstown branch produced revenue on the other lines and segments of B&O (including the middle and southern segments) totalling $107,026, and that the cost of handling this traffic on the other B&O lines and segments was $53,513.

Finally, pages 10a and 11a show that the Beardstown branch in 1971 generated total B&O system revenues of $167,759 [Line 3(c)] and that B&O incurred total system costs of $180,884 in handling this traffic [$127,371 costs on the branch and $53,513 on the balance of the B&O System] for a Net Railway Operating Deficit of $13,125.

Petitioners' contention that the I.C.C. erred in permitting abandonment of the Beardstown line, without evidence concerning the impact upon the viability of the remaining line segments of B&O, is simply not supported by the facts. Petitioners' argument that B&O should continue to operate the Beardstown branch at a loss because of its "feeder" value to other B&O lines, such as the middle and southern segments, is invalid and should be rejected by this Court, as it was by the Court below.

As the Commission said in authorizing the abandonment of the Beardstown branch, "There is no possibility that the costs of rehabilitation [$2,800,000] can be recouped from the earnings of the branch." [Appendix E, p. 28a]

The Commission and the courts have held in many decisions that even a profitable operation of a branch line will not preclude abandonment where the evidence shows that the continued operation of the lightly used line would require expensive maintenance, repair or rehabilitation expenditures. *Purcell* v. *United States*, 315 U.S. 381, 382, 385; *Asbury* v. *United States*, 298 F. Supp. 589, 593.

In *Moeller* v. *Interstate Commerce Commission*, 201 F. Supp. 583, the Court, at Page 587, discusses the Com-

mission's formula for determining the "feeder value"[5] of a branch line proposed for abandonment to the other segments and lines of the carrier, and at page 588, the Court says:

> "In regard to the matter of determining the allocation of revenues and costs of operation of a branch line, the experience of the Commission is of importance. Because of its experience in that field, the findings of the Commission as to the proper allocation of revenues and expenses should not be overturned unless it can be shown that such allocations were arbitrary or otherwise clearly erroneous."

This Court pointedly remarked in *New York* v. *United States*, 331 U.S. 284, 328:

> "We start, of course, from the premise that on a subject of transportation economics, such as this one, the Commission's judgment is entitled to great weight. The appraisal of costs figures is itself a task for experts."

Petitioners have failed to show that the Commission's refusal to consolidate the three proceedings was arbitrary, capricious or an abuse of discretion. They have also failed to substantiate, in any manner, whatsoever, that they were adversely affected by the Agency's action.

In the words of Professor Davis in 1 *Administrative Law Treatise* 573 (1958):

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[5] In *Washington and Old Dominion Users Ass'n.* v. *United States*, 287 F. Supp. 528, at 532-3, the Court sustained the Commission's abandonment order even though the record did not contain "specific evidence" of the feeder value, because the record as a whole showed the amount would be de minimis. In the Beardstown proceeding the "specific evidence" of the $53,513 feeder value of the branch is in the record, and it is less than the $66,638 deficit incurred in operating the branch. In authorizing abandonment the Commission concluded that B&O should not be required to spend $2,800,000 to rehabilitate a line that causes a B&O system deficit of $13,125.

"The dominant feature of judicial opinions on challenges of administrative orders consolidating or refusing to consolidate proceedings is that the problem is for agency discretion. The Supreme Court has frequently so asserted in cases coming up from the ICC."

Courts have sustained the Commission's consolidation of proceedings, *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 523 (1946); *Wales* v. *United States*, 108 F. Supp. 928, 932 (N.D. Tex. 1952), aff'd mem., 345 U.S. 954 (1953); *Akron, C. & Y. Ry. Co.* v. *United States*, 22 F. 2d 199, 202 (W.D.N.Y. 1927), as well as its refusal, upon request, to order the consolidation of proceedings. *United States* v. *Northern Pacific Ry.*, 288 U.S. 490, 501-502 (1933); *Railway Express Agency* v. *United States*, 205 F. Supp. 831, 835 (S.D.N.Y. 1962). As this Court said in *American Trucking Associations* v. *United States*, 326 U.S. 77, 83 (1945), "*** the Commission may wish to consolidate hearings on the applications, but that is a matter of administrative discretion."

In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940), the Supreme Court said:

"[T]he scope of the inquiry, whether applications, should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions — were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest."

Accord, *Communications Comm'n.* v. *WJR*, 337 U.S. 265, 283 (1949); *N.L.R.B.* v. *Local Joint Executive Board of Hotel and Restaurant Employees*, 301 F. 2d 149, 155-56 (9th Cir. 1962); *Memphis Light, Gas & Water Div.* v. *F.P.C.*, 243 F. 2d 628, 631 (D.C. 1957); *United Air Lines* v. *C.A.B.*, 228 F. 2d 13, 16 (D.C. Cir. 1955).

C. The Decision of the Court of Appeals in This Case does Not Involve a Question of Law Which Has Not Been Settled by This Court, nor Is It in Conflict With a Decision of This Court, or Any Other Federal Court of Appeals

In sustaining the Interstate Commerce Commission below, the Court of Appeals said that "the choice of whether or not to consolidate related proceedings is 'a matter for administrative discretion'". Furthermore, contrary to the assertions of Petitioners, the decision of the Court below clearly establishes that it is not in conflict with this Court's opinion in *American Trucking Ass'ns.* v. *U.S.*, 326 U.S. 77 (1945). The Court below said at pages 3a-6a of Appendix A,

"We begin our consideration by noting that petitioners do not directly attack the substantive conclusion of the ICC that the public convenience and necessity permit abandonment of the northern segment. Instead, they argue that the ICC improperly considered the northern segment abandonment application in a vacuum, without proper regard for interrelationships between all three segments which they characterize as part of one 228-mile line.***

First, petitioners assert that the ICC should have consolidated the northern and southern segment proceedings in response to their 1972 motion, and should have reopened both of these for consolidation with the middle segment proceeding in response to their 1973 motion. We disagree. The choice of whether or not to consolidate related proceedings is "a matter for administrative discretion," *American Trucking Associations, Inc.* v. *United States*, 326 U.S. 77, 83 (1945), and it is not for this court to dictate to the ICC the procedures it should follow in discharging its duties, *See Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). As the District of Columbia Circuit recently recognized:

> 'No principle of administrative law is more firmly established than that of agency control of its own calendar. Practical problems of calendar administration confront an agency whenever related applications are pending at the same time. Consolidation *** and similar questions are housekeeping details addressed to the discretion of the agency and, due process or statutory considerations aside, are no concern of the courts.'

Association of Massachusetts Consumers, Incorporated v. *United States Securities and Exchange Commission*, 516 F. 2d 711, 714 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976), quoting *City of San Antonio* v. *Civil Aeronautics Board*, 374 F. 2d 326, 329 (D.C. Cir. 1967). *See also* 1 *K. Davis, Administrative Law Treatres* § 8.12, at 572-73 (1958). There are no statutory or due process considerations present here, and no suggestion is made that the comparative hearing exception of *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945), and its progeny, has any application to this case. We perceive no abuse of the ICC's substantial discretion in this regard; both the ALJ's decision and the Commission's 1975 order denying consolidation after B&O sought to abandon the middle segment set out sound reasons for denying consolidation, and it is not our function to second-guess these determinations.

Petitioners' second argument, which relies heavily on *American Trucking Associations, Inc.* v. *United States, supra*, is that even if the ICC was not obliged to consolidate the segment proceedings, it was obliged, in determining the public convenience and necessity, to consider the effects of abandoning each segment on the other segments. In *American Trucking*, a rail carrier filed fourteen applications for authorities to conduct trucking services auxiliary to its rail services, parallel to the railroad's main lines and covering most of the distance between Richmond, Virginia and Jacksonville, Florida. Numerous entirely independent hearings were conducted on a segmented basis, and evidence of the effect of the proposed service on non-

rail carriers in the areas covered was excluded in each proceeding. The Court did require that evidence be admitted pertinent to the effect on motor carriers of all the applicant's routes, and stated that evidence of truck flow from points covered by one application to points covered by one application to points covered by another could not be excluded. 326 U.S. at 85. We think that the requirement of assessing impact on non-rail carriers which did not limit their operations to the neat little geographic packages represented in the fourteen applications made a stronger case for consideration of segment interrelationships in *American Trucking* than is present in this abandonment proceeding. But assuming *arguendo*, that appropriate consideration of possible interrelationships was required here, we believe any such requirement was met.

With reference to the only two abandonment applications pending at the time, covering the northern and southern segments, the same ALJ heard both proceedings and was thoroughly familiar with the comparative considerations underlying both. He concluded that "[e]ach of the proceedings is clearly identifiable and separate," and that "the shippers and their interest are different." We have reviewed the record, and we surely cannot say that these findings lack substantial support in the evidence. In this regard, we think it is significant that the record shows that the preponderance of northern segment traffic moved east from Sangamon Junction to Indianapolis and did not travel on either the middle or southern segments, and that of more than 2500 cars moving over either the northern or southern segments in 1971, only 14 moved on both segments. We also note that the ALJ found the conditions pertaining to the northern and southern segments to be so different that he recommended granting the former and denying the later application for abandonment.

With respect to interrelationships between the northern and middle segments, we repeat the important fact that no application for abandonment of the middle segment had been made at the time of

hearing or initial decision on the northern segment. We do not believe it was incumbent on the ALJ to forecast B&O's intentions regarding the middle segment in 1972 and to design his hearing schedule and evidentiary rulings on the basis of the then unfounded assumption that abandonment was in the works. *Cf. American Trucking, supra*, 326 U.S. at 83. Nor do we think there was any requirement that the ICC, in determining the public convenience and necessity, reopen this proceeding more than two years after the record was closed and recommendations were made because B&O did ultimately file an abandonment application on the middle segment in 1975. In any case, the ALJ had before him evidence that most of the northern segment traffic travelled on east to Indianapolis rather than southeast over the middle and/or southern segments. Because the northern segment traffic was light to begin with, we surely cannot say that the ALJ's later-adopted report inadequately considered appropriate interrelationships. Petitioners contention that they were improperly denied access to more specific breakdowns on traffic data relating the northern and middle segments must be rejected for similar reasons."

III

CONCLUSION

The Commission's Order is proper and should not be set aside. The Interstate Commerce Commission concluded that the public convenience and necessity permits abandonment of the Beardstown line. This conclusion was reached because of the insignificant amount of traffic handled on the line; the absence of any foreseeable traffic potential in the future; the marginal nature of the operation; the large rehabilitation costs necessary to continue service; and the general lack of interest by shippers in continued operation of the line.

The purpose of the Interstate Commerce Act is to foster the development and preservation of a national transportation system adequate to meet the needs of the country. This purpose clearly contemplates the elimination of waste and unnecessary expenditures which burden interstate commerce. *Texas* v. *United States*, 292 U.S. 522, 530. *Colorado* v. *United States*, 271 U.S. 153, 163, 168. As this Court said in *Colorado* v. *United States*, 271 U.S. at 168:

> The sole test prescribed is that abandonment be consistent with public necessity and convenience . . . . The benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. Compare Proposed Abandonment by *Boston & Maine R.R.*, 105 I.C.C. 13, 16. The result of this weighing — the judgment of the Commission — is expressed by its order granting or denying the certificate.

This Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 1951, 340 U.S. 474, 71 S. Ct. 456, 95 L.Ed. 456, has interpreted the Administrative Procedure Act to require affirmance of the findings of an administrative agency if, taking the record as a whole, they are supported by substantial evidence, that is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The Commission's order is the product of expert judgment which carries a presumption of validity. "And he who would upset the *** order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *I.C.C.* v. *Jersey City*, 322 U.S. 503, 512, 64 S. Ct. 1129, 1134, 88 L. Ed. 1420.

Here the Commission weighed the evidence, and the fact that the rehabilitation cost of the Beardstown line could not be recovered, against the need for service, as evidenced by the lack of interest in the continuance of rail operations by the shippers, and concluded to approve the abandonment. This finding is clearly supported by the facts of record. Indeed, Petitioners in asking this Court to review the Commission's Order do not, in any manner

whatsoever, attack the basic findings by the Commission that there is no possibility that B&O can recover the cost of rehabilitation from the earnings of the Beardstown line. As the Commission's Order says:

> "A carrier should not be required to continue indefinitely operation of a branch line which will not pay the cost of operation, maintenance and taxes ***. The Commission and the Courts often have expressed the view that improvident expenditures by a common carrier should not be required by governmental fiat. Cf., *Purcell* v. *United States*, 315 U.S. 381." [Appendix E, pages 28a-29a.]

Rule 19 of the Supreme Court Rules states that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

Certainly this is a case where no special or important reasons exist for granting certiorari. On the contrary, it is one where the public interest will be served by denying it. Petitioners have failed to show that the decision of the U.S. Court of Appeals for the Seventh Circuit has decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way in conflict with applicable decisions of this Court.

The petition for certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX I

Exhibit H-14

My name is Frank Rongione. I am Manager of Profit Margin Research for The Chesapeake and Ohio Railway and The Baltimore and Ohio Railroad Company, and my office address is Room 2011, 1 Charles Center, Baltimore, Maryland.

I have been employed by the B&O since 1962 and the C&O-B&O since 1965. Prior to 1962, I was employed by the Pennsylvania Railroad for 15 years. The predominant part of my railroad service has been spent in railroad cost analysis work.

I received a Bachelor of Science degree from St. Joseph's College, Philadelphia, majoring in business administration. I have also done some graduate work in statistical techniques and analysis.

My duties encompass the preparation and/or directing the preparation of various revenue and cost studies for use by management or for use before various federal and state regulatory bodies. The data prepared for this proceeding, as shown in Appendices A to C attached, were prepared under my direction and supervision.

Appendix A – Shows for the years 1969, 1970 and 1971 the total revenue generated by branch patrons, i.e., B&O Revenue for loads originating and terminating and also the revenue for traffic moving overhead to the branch. The total revenue is assigned to the branch and balance of the B&O system by the usual method as approved by the Interstate Commerce Commission in Chicago & N. W. Railway Co. abandonment, 275. I.C.C. 759. Also shown are the other revenues generated by this branch, such as demurrage.

Appendix A-1 – Shows the revenue accruing to B&O family lines.

Appendix B – Shows the costs that would have been avoided if this branch had not been operated during the years 1969, 19 and 1971.

Appendix C – Shows that for the years 1969, 1970 and 1971 B&O incurred income of $16,876 in 1969; income of $27,882 in 1970; and a deficit of $13,125 in 1971 by operating this branch line.

The financial figures for 1969, 1970 and 1971 do not, however, tell the whole story, nor are they an accurate estimate of the magnitude of the deficits that will be incurred in the years ahead if the line is not abandoned. This is due to the fact that in past years, in an effort to economize and keep the line in service, B&O spent far less on maintenance than should have been spent. For example, in 1969, 1970 and 1971 maintenance expenditures were $39,877, $45,817 and $53,468, respectively, whereas a proper normalized level of maintenance required an expenditure of $132,382 per year.

Because less than a normalized amount has been spent in past years, the line now requires rehabilitation which will cost $1,630,644.[1]

If this line is not abandoned the projected deficit will be $217,089 per year in future years. This figure is based on 1971 traffic, revenue and costs except normalized maintenance of way costs and the rehabilitation expense of $1,630,644 have been taken into consideration. The cost to amortize the rehabilitation expenditure over a 30 year period at 7% interest is $130, 452 annually. Table I, below, shows the details:

[1] This $1,630,644 rehabilitation cost does not include $1.2 million rehabilitation for the bridges on the Beardstown line. Total rehabilitation expense exceeds $2.8 million. [See Judge Jessup's order, Appendix E, p. 20a]

TABLE I

PROJECTED NET RAILWAY OPERATING DEFICITS FOR FUTURE YEARS IF LINE IS NOT ABANDONED

Branch Revenues		$ 60,733
Branch Costs (Excluding Actual Maintenance of Way Costs)	$ 68,501	
Branch Normalized Maintenance of Way Costs	132,382	
Total Branch Costs		200,883
Branch Net Railway Operating Deficit	Deficit	($140,150)
Balance of B&O System Revenues		$107,026
Balance of B&O System Costs at 50%		53,513
Balance of B&O System Net Railway Operating Income		$ 53,513
B&O Net Railway Operating Deficit before Provision for Branch Rehabilitation	Deficit	($ 86,637)
Branch Rehabilitation Costs ($1,630,644 Amortized Over 30 years at 7% interest)		130,452
Projected Annual B&O Net Railway Operating Deficit	Deficit	($217,089)

In Ex Parte 274 the Interstate Commerce Commission said that it had recently completed a study of abandon-

ment proceedings before the commission in 1969 and 1970. Based on the findings in the study the Commission said that "*For a 12 month period, 34 carloads of freight traffic per mile of trackage are necessary to enable a railroad to operate the trackage on a break-even basis.*"

The traffic generated by this branch line is substantially below the 34 carloads per mile of track that the Commission said was required for a break-even operation. The carloads in 1971 were only 18 cars per track mile. In 1971 a total of 478 cars moved overhead to the branch. Upon abandonment this overhead traffic can be handled via other railroad junction points. A total of only 322 carloads originated or terminated on the branch, or only 7 cars per mile of track.

APPENDIX A

THE BALTIMORE AND OHIO RAILROAD COMPANY

BEARDSTOWN BRANCH

REVENUES FROM TRAFFIC HANDLED – 1969, 1970 AND 1971

	1969	1970	1971
1. Local Freight Originated at and Destined to Points on Line to be Abandoned	$ 1,180	$ 111	$ 0
2. Freight Moved Between Points on Line to be Abandoned and Points Beyond It	92,496	59,417	51,206
3. Overhead or Bridge to the Line to be Abandoned	87,769	140,879	114,473
4. Total Revenue Accruing to B&O Through Use of Line to be Abandoned (Sum of Lines 1-3)	$181,445	$200,407	$165,679
5. Revenue Accruing to Line Proposed to be Abandoned	61,644	72,560	58,653
6. Revenue Accruing to Balance of B&O (Line 4 minus Line 5)	$119,801	$127,847	$107,026
Other			
7. Miscellaneous Charges (Demurrage, Switching, etc.)	3,070	6,771	2,080
8. Total Revenues (Line 4 + Line 7)	$184,515	$207,178	$167,759

APPENDIX A-1

THE BALTIMORE AND OHIO RAILROAD COMPANY

BEARDSTOWN BRANCH

FAMILY LINE REVENUES AND COSTS ON TRAFFIC MOVING ON THE BEARDSTOWN BRANCH 1969, 1970, AND 1971

Item	Source	1969	1970	1971
1. Family Line Revenues				
(a) The Chesapeake and Ohio Railway	Division percent applied to freight charges on waybill or freight bill	$ 934	$ 974	$ 445
(b) Western Maryland Railway		114	–	19
2. Total Family Line Revenues	Line 1(a) + Line 1(b)	$1,048	$ 974	$ 464
3. Family Line Costs	50 percent of Line 2	524	487	232
4. Net Railway Operating Income	Line 2 minus Line 3	$ 524	$ 487	$ 232

APPENDIX B

THE BALTIMORE AND OHIO RAILROAD COMPANY

BEARDSTOWN BRANCH

AVOIDABLE MAINTENANCE AND OPERATING COSTS FOR THE YEARS 1969, 1970, AND 1971

Acct. No.	Account	Basis of Cost	1969	1970	1971
	Maintenance of Way				
202	Roadway Maintenance	Actual	$ 5,455	$ 6,279	$ 5,559
208	Bridges, Trestles & Culverts	Actual	2,482	2,857	10,767
212	Ties	Actual	1,000	1,150	1,000
214	Rails	Actual	0	0	0
216	Other Track Material	Actual	2,200	2,530	3,200
218	Ballast	Actual	300	345	0
220	Track Laying and Surfacing	Actual	24,002	27,628	25,070
221	Fences, Snowsheds & Signs	Actual	0	0	0
229	Roadway Buildings	Actual	200	230	0
249	Signals & Interlockers	Actual	2,682	3,087	5,396
272	Removing Snow, Ice & Sand	Actual	0	0	0
273	Public Improvement Maint.	Actual	0	0	0
277	Emp. Health & Welfare Benefits	Percent of Labor Cost	1,556	1,711	2,476
	Total Maintenance of Way		$ 39,877	$ 45,817	$ 53,468

THE BALTIMORE AND OHIO RAILROAD COMPANY
BEARDSTOWN BRANCH
AVOIDABLE MAINTENANCE AND OPERATING COSTS FOR THE YEARS 1969, 1970, AND 1971

Acct. No.	Account	Basis of Cost	1969	1970	1971
	Maintenance of Equipment				
311	Other Locomotives-Repairs	At System Cost per Unit Mile	$ 4,554	$ 5,361	$ 6,694
314 330 331	Car Costs	System Average Per Diem and Mileage Costs Times Branch Days and Car Miles (Excluding Overheads)	8,454	7,496	4,516
	Total Maintenance of Equipment		$ 13,008	$ 12,857	$ 11,210
	Transportation				
376	Station Expenses	Actual	$ 21,147	$ 20,526	$ 22,129
392	Enginemen	Actual	6,014	6,446	6,951
394	Train Fuel	At System Cost per Unit Mile	4,456	4,641	6,121
397	Water for Train Locomotives	At System Cost per Unit Mile	14	13	1/
398	Lubricants for Train Locomotives	At System Cost per Unit Mile	209	307	2/

THE BALTIMORE AND OHIO RAILROAD COMPANY
BEARDSTOWN BRANCH
AVOIDABLE MAINTENANCE AND OPERATING COSTS FOR THE YEARS 1969, 1970 AND 1971

Acct. No.	Account	Basis of Cost	1969	1970	1971
	Transportation				
399	Other Supplies for Train Locomotives	At System Cost per Unit Mile	180	237	1/
400	Servicing Train Locomotives	At System Cost per Unit Mile	0	0	278
401	Trainmen	Actual	13,666	14,580	15,982
402	Train Supplies & Expenses	At System Cost per Unit Mile	672	563	305
409	Emp. Health & Welfare Benefits	Percent of Labor Cost	1,268	1,470	1,736
	Total Transportation		$ 47,626	$ 48,783	$ 53,502
	Railway Tax Accruals				
532	Railroad Retirement & Unemployment	Tax Rate Applied to Labor Cost	$ 7,228	$ 7,915	$ 9,191
	Total Branch Costs		$107,739	$115,372	$127,371

1/ As result of I.C.C. Accounting changes 1/1/71; these expense items now included in Account 400. Above figures exclude enginehouse expenses (Account 400).

2/ As result of I.C.C. Accounting changes 1/1/71; this expense item now included in Account 311.

APPENDIX C

THE BALTIMORE AND OHIO RAILROAD COMPANY

BEARDSTOWN BRANCH

EFFECT OF PROPOSED ABANDONMENT ON NET RAILWAY OPERATING INCOME FOR THE YEARS 1969, 1970, AND 1971

Item	Source	1969	1970	[illegible]
1. Line Proposed to be Abandoned				
(a) Revenues – Freight	Appendix A	$ 61,644	$ 72,560	$ 58,653
(b) Revenues – Other	Appendix A	3,070	6,771	2,080
(c) Total Revenues	Line 1(a) + Line 1(b)	$ 64,714	$ 79,331	$ 60,733
(d) Costs	Appendix B	107,739	115,372	127,371
(e) Net Railway Operating Deficit	Line 1(c) Minus Line 1(d)	$(43,025)	$(36,041)	$(66,638)
2. Balance of B&O System				
(a) Revenues – Freight	Appendix A	$119,801	$127,847	$107,026
(b) Revenues – Other		0	0	0
(c) Total Revenues	Line 2(a) + Line 2(b)	$119,801	$127,847	$107,026
(d) Cost	50% of Line 2(c)	59,900	63,924	53,513
(e) Net Railway Operating Income	Line 2c( ) Minus Line 2(d)	$ 59,901	$ 63,923	$ 53,513

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APPENDIX C – Continued

THE BALTIMORE AND OHIO RAILROAD COMPANY

BEARDSTOWN BRANCH

EFFECT OF PROPOSED ABANDONMENT ON NET RAILWAY OPERATING INCOME FOR THE YEARS 1969, 1970, AND 1971

Item	Source	1969	1970	1971
3. Total B&O System				
(a) Revenues – Freight	Line 1(a) + Line 2(a)	$181,445	$200,407	$165,679
(b) Revenues – Other	Line 1(b) + Line 2(b)	3,070	6,771	2,080
(c) Total Revenues	Line 3(a) + Line 3(b)	$184,515	$207,178	$167,759
(d) Costs	Line 1(d) + Line 2(d)	167,639	179,296	180,884
(e) Net Railway Operating Income (Deficit)	Line 3(c) Minus Line 3(d)	$ 16,876	$ 27,882	$(13,125)

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